

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 130 of 1978

For Approval and Signature:

Hon'ble MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

RAIJI RUPSANG

Versus

KHODABHAI M PADHIYAR

Appearance:

MR MI PATEL for Appellant

MR PJ VYAS for Respondent No. 1

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 10/01/97

ORAL JUDGEMENT

1. The present appeal is one under section 100 of CPC, wherein the appellants are the original defendants and the respondents are the original plaintiffs.

2. The plaintiffs filed suit on the basis that they are the heirs of one Ranchhod Bababhai and one Mavabhai Kabhai, and that they are the exclusive owners of the suit wada land (described at Lot- A to the plaint), and as such they are in use and exclusive occupation of the

same since many years. According to the plaintiffs, defendants have adjoining properties described in Lot-B & C to the plaint, and the defendants have no right to put doors or windows upon the suit wada land, nor to use the said land for access to or for ingress or egress to their own property. The plaintiffs therefore, prayed for a permanent injunction restraining defendants from using the suit land, and an injunction restraining them from putting up doors and windows upon the suit land. The plaintiffs further prayed for a mandatory injunction, directing the defendants to close down the doors put up in the walls of the defendants' properties.

3. The trial court, after framing issues at ex.55, and recording findings on the relevant issues, dismissed the suit of the plaintiffs.

4. The plaintiffs thereupon preferred a Regular Civil Appeal under section 96 of CPC to the Extra Assistant Judge at Baroda, who was pleased to set aside the judgment and decree of the trial court dismissing the plaintiffs' suit, and who allowed the appeal to the extent that the mandatory & prohibitory injunctions, sought in respect of both doors and windows, was granted in respect of only doors.

5. It is against the said appellate decree that the original defendants have preferred this present appeal under section 100 of CPC.

6. Before dealing with the present matter, it is pertinent to note the scope and ambit of the Court's powers while sitting as a second appellate court under section 100 of CPC.

7. The scope of section 100 CPC, and the powers of the High Court while exercising jurisdiction as a second appellate court are by now well defined and require no detailed discussion. The Supreme Court has, in the case of Ramaswamy Kalingaryar Vs. Mathayan Padayachi (AIR 1992 Supp (1) SCC page 712), and in the case of Parsini (dead) through Legal Representatives Vs. Atma Ram (AIR 1996 SC 1558), clearly reiterated the principle that the High Court cannot, while functioning as a second appellate court under section 100 CPC, upset the findings of fact recorded by the lower appellate court by reassessing the evidence, or reassess the qualitative value of such evidence on record, and thus cannot reverse such findings of fact. In fact, the High Court cannot interfere with such findings of fact even by examining or reappreciating the evidence from the aspect of

"sufficiency of proof ".

8. It is pertinent to note here that although the plaintiffs have filed suit on the basis that they are the exclusive owners of the suit- wada land, and as such they been using and are in occupation of the same since many years, they have not chosen to seek any declaration of title from the trial court in respect of the suit land. Thus, the question of title is not of paramount importance.

8.1 In this context, it is the question of possession and the right of enjoyment which is the crux of the matter. I may note here at this stage, that the treatment given by the lower appellate court to the case put up by the defendants is far from ideal. It must be noted in this context, that the case as put up by the defendants in their written statement ex.27, and as sought to be established by them by leading appropriate evidence on record, creates a controversy on facts which is irreconcilable. No doubt, it is open to a defendant to raise contentions which are inconsistent with each other, so long as the facts necessary to be proved for establishing such averments do not demolish one or the other stand sought to be taken. In this context, the defendants in one breath claim to be in use, occupation and possession of the suit land since over 30 years. In this context, they further plead, by taking a specific plea that they have acquired title by adverse possession. On the other hand, the irreconcilable stand taken by them is that they were in possession as joint owners or co-owners of the same, along with the plaintiffs.

8.2 The lower appellate court has examined the evidence in detail, and after discussing the same in paragraphs 15 to 19 of the impugned judgment, arrived at a conclusion that on the balance of probabilities, the evidence led by the plaintiffs is more reliable and worthy of credence, and has also come to an independent conclusion that the defendants have failed to prove their case, as pleaded in their written statement.

8.3 In this context, the evidence led by the defendants and their witnesses, itself indicates that the doors put up by the defendants had been put up just prior to the suit. As against this, the Jaliyas(i.e.grilles) had been put up many years ago, but this was with the consent of the plaintiffs. In other words, it required the consent of the plaintiffs to enable the defendants to put up the grilles in question, as against which the defendants put up the doors abutting on the disputed land

just prior to the plaintiffs' suit, and this was without the plaintiff's consent. These factors when examined in the proper perspective, clearly indicate that the defendants have no right to put up the doors or grilles abutting on the suit property. Obviously therefore, they had no right to pass over the suit property.

8.4 The lower appellate court has also adopted an acceptably correct perspective in weighing the evidence led by the defendant and his witnesses when observing that such witnesses were either relations of the defendants or close family associates, and that therefore, their evidence cannot be lightly accepted. Furthermore, these witnesses do not reside in the vicinity of the disputed land, and therefore, were not in a position to depose as to the rights of the defendants, particularly in the form of their personal knowledge.

8.5 The lower appellate court has rightly rejected the defendants' plea as to acquisition of title or other rights by adverse possession. Clearly the burden of proof would be on the defendants. Clearly the defendants would be required to prove that even if they were in possession of the disputed property, such possession had been hostile to the plaintiffs, for an uninterrupted and prescribed period, and such possession had been to the exclusion of the plaintiffs. Obviously, the defendants have failed to establish these essential ingredients. One essential ingredient which has not been considered by the lower appellate court, which the defendants would also be required to prove, was that such possession, and the exercise of rights on the part of the defendants, was within the knowledge of the plaintiffs. When this position in law is applied to the facts sought to be established by the defendants, the deficiencies in the defendants' case become more glaring. First of all, the Jaliyas i.e. grilles were admittedly put up by the defendants with the consent of the plaintiffs. Admittedly, the doors were put up just prior to the suit. Admittedly, the defendants have not positively asserted that the suit land was used by them for ingress and egress to their properties. With these admitted facts, it is not possible by any stretch of imagination to hold that the defendants had held hostile possession and/or exclusive and continuous possession in respect of the suit land to the exclusion of the plaintiffs.

8.6 The treatment meted out by the lower appellate court to the plaintiffs' evidence, and particularly to the interpretation of the Commissioner's map cannot be faulted, in the overall perspective of other evidence on

record.

9. Thus, it will be seen that the impugned judgment and decree of the lower appellate court is based upon appreciation of evidence on record, which in my opinion, is both reasonable and rational. Such appreciation cannot be said to be perverse in fact, or in law, nor can it be suggested that the impugned judgment and decree constitutes a case of "no evidence".

10. In the premises aforesaid, in view of the scope and ambit of the present appeal under section 100 of CPC, it is not open for this Court to interfere with findings of fact recorded by the lower appellate court on the basis of appreciation of evidence. The impugned judgment and decree of the lower appellate court therefore, requires to be upheld. This appeal is therefore, dismissed with no order as to costs.

Amp/-